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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 297

HERMAN FREDERICK WILLKIE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Herman Frederick Willkie, by his undersigned attorney, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that court entered in the above cause on May 12, 1942 (R. 93).

Nature of the Controversy.

This is a proceeding involving a deficiency in income taxes in the amount of $4,427.73, asserted against the petitioner by the respondent for the taxable year 1937.

The basis for the deficiency asserted by the respondent was that an amount of $15,000, reported by the petitioner as a gift received from Hiram Walker & Sons, Inc., in

1937, constituted taxable income as additional compensation paid for past services (R. 7-8). The Board of Tax Appeals sustained the determination of the respondent and the Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the Board.

Statement of Facts.

Hiram Walker-Gooderham & Worts, Limited, is a Canadian company which operates entirely through subsidiaries. It is the parent company of the corporations hereinafter referred to (R. 15-16).

Hiram Walker & Sons, Limited, is the subsidiary operating in Canada; Hiram Walker & Sons, Incorporated, is the subsidiary operating in the United States, and Hiram Walker & Sons of Scotland, Limited, was organized early in 1937, prior to May 1, and is the subsidiary operating in Scotland (R. 16).

Petitioner was originally employed by Hiram Walker & Sons, Limited, on February 15, 1927, and later became its general superintendent and a director of that company. Hiram Walker & Sons, Incorporated, was incorporated in 1933 and petitioner became vice president in charge of production of that company, his duties being to build, organize and operate a distillery in Peoria, Illinois (R. 16).

Petitioner became a director of Hiram Walker-Gooderham & Worts, Limited, about November, 1933, and received an annual director's fee of $2,000 per year. Petitioner devoted practically all of his time to the affairs of Hiram Walker & Sons, Incorporated, and his salary was paid by that company. For the years 1936 and 1937, his salary was $30,000 per year. This was like in amount to the salary received by the chairman of the boards of the parent company and Hiram Walker & Sons, Incorporated,

and was equal to 75% of the salary received by the president of Hiram Walker & Sons, Incorporated (R. 16).

Early in 1937, petitioner went to Scotland to assist in the launching of the new company there, whose plant and equipment he had designed. During this time in Scotland, he was paid his regular salary by Hiram Walker & Sons, Incorporated (R. 16).

On May 12, 1937, petitioner tendered his resignation as an employee of Hiram Walker & Sons, Incorporated, to its president, Mr. Hume (R. 16). The latter then told the petitioner he would rather not accept the resignation until it could be discussed at a meeting of the board of directors of the parent company (Hiram Walker-Gooderham & Worts, Limited), which was to be held about ten days later. The petitioner agreed to this but stated that his determination to resign was unalterable (R. 16, 27-28). Thereafter, the petitioner performed no duties (R. 28).

On May 28, 1937, petitioner attended the meeting of the parent company and restated his resignation as an employee and director of Hiram Walker & Sons, Incorporated. He stated his reasons to be that he felt that his talents were not being fully utilized and that his major work had been completed. After a request for reconsideration, which petitioner refused, his resignation was accepted. He then left the meeting. Thereafter the following resolution was passed by the board of directors (R. 17):

> "It was moved by Mr. McCarthy, seconded by Mr. Lash, and unanimously carried that Mr. Willkie be given a cheque equal to six months' salary in appreciation of services rendered" (R. 17).

Later on that day, Mr. Hatch (Chairman of the Boards of the parent company (R. 28) and of Hiram Walker & Sons, Incorporated (R. 43)) sent for petitioner and told him that he had voted to give petitioner a present of

$15,000. Petitioner replied, "I don't want you to do that." Mr. Hatch then stated: "Well, we feel that we want to." Petitioner again refused, stating, "Well, I still feel the same way about it. I have been fully compensated for my services and you owe me nothing, and I don't want a gift from you." Hatch insisted and said, "It wasn't just me. The Board was unanimous in their decision." Petitioner, however, merely indicated again his refusal (R. 31).

At that time petitioner had been paid all sums due him under his contract of employment with Hiram Walker & Sons, Incorporated, and as a director of the parent company (R. 17).

A few days later, petitioner went to Mr. Hume's office and told him that he (the petitioner) "probably had not been very gracious about the action they had taken." Mr. Hume thereupon gave petitioner a check of Hiram Walker & Sons, Incorporated, in the amount of $15,000 (R. 36).

At no time during the petitioner's employment by the corporations above described had any of them had a policy of paying bonuses or additional compensation to officers (R. 37).

Petitioner did not report the $15,000 as taxable income on his federal income tax return for 1937 (R. 39), but indicated that he had received that amount as a gift from Hiram Walker & Sons, Incorporated (R. 17). The federal income tax return of Hiram Walker & Sons, Incorporated, for the year in question showed that it deducted the $15,000 for the purpose of arriving at its taxable income, claiming it as compensation paid petitioner (R. 17).

The parent company, Hiram Walker-Gooderham & Worts, Limited, had power during 1937 to make a gift to an employee or former employee of the parent company or its subsidiary, Hiram Walker & Sons, Incorporated (R. 17).

The Question Presented.

Whether the Board and the Court below were correct in characterizing as "compensation for personal service" within the meaning of Section 22 (a) of the Revenue Act of 1936,* the $15,000 received by the petitioner from Hiram Walker & Sons, Incorporated, as a present, "in appreciation of services rendered", after petitioner had severed all connections with and been fully compensated for all services rendered Hiram Walker & Sons, Incorporated.

Reasons for Granting the Writ.

I. There is a conflict among the decisions of the various circuit courts of appeal on the question here involved which should be resolved by this Court. Agreeing with the Court below are: in the First Circuit, *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1, 1937); in the Second Circuit, *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2, 1932); and in the Ninth Circuit, *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9, 1936). Reaching the opposite result are: in the Third Circuit, *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3, 1929); *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3, 1933); in the Fourth Circuit, *Hall* v. *Commissioner,* 93 F. (2d) 1005 (C. C. A. 4, 1938); and in the Fifth Circuit, *Simpkinson* v. *Commissioner,* 93 F. (2d) 1015 (C. C. A. 5, 1937).

The sharp conflict between these decisions of the several circuit courts of appeal on the basic question whether amounts, in addition to all compensation due, which are given a departing employee, are compensation for personal services, is clearly shown by the comparative analysis of the salient facts of the above cases set forth in the Appendix, infra, p. 19.

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* The statute and regulations are set out in full in the Appendix, infra, p. 18.

II. The Court below has decided the question here involved in a way which conflicts with the applicable decision of this Court, in that it failed to follow the rule of *Bogardus* v. *Commissioner*, 302 U. S. 34 (1937), which held that payments made to a former employee in recognition of his valuable and loyal services did not constitute "compensation" for personal services within the meaning of the Revenue Act of 1928. The lower Court's failure to give proper effect to the said decision of this Court is shown by the comparison of the facts in the two cases which is set forth in the Appendix, *infra*, p. 19.

III. The Court below stated:

> "We may substitute our judgment for that of the Board in determining whether the present payment was a gift. *Bogardus* v. *Commissioner of Internal Revenue*, 302 U. S. 34, 38" (R. 96).

The Court subsequently discussed the evidence and decided that the amount in question was compensation rather than a gift to petitioner. In arriving at this decision, the Court adopted and gave weight to the following presumption, for which, as clearly appears from the Court's statement, there is no support whatsoever in the record:

> "The petitioner having failed to put in evidence the book entries made on the payor's books simultaneously with the payment in question, we presume such entries would support the deduction claimed in the payor's income tax return and that such book entries would show that the payor treated the sum paid the petitioner as compensation.
>
> "When the income tax deduction of the payor is tied to its earlier book entries on the subject, the evidence of the deduction is of weight in deciding the question of whether or not the payment was a gift to petitioner.
>
> "All of the elements to be taken into account in determining whether the present payment was a gift or compensation for past services lead to the conclusion

that the sum received by the petitioner constituted a part of his gross income for the tax year in question'' (R. 97-8).

In basing its decision, in part, upon evidence—this presumption—not of record, the Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in this cause to the end that this cause may be reviewed and determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

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